No. 24-1234

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

ALI DANIAL HEMANI,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF EVERYTOWN FOR GUN SAFETY AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATUTES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

INTEREST OF AMICUS CURIAE[1]

Everytown for Gun Safety (formally, Everytown for Gun Safety Action Fund) is the nation's largest gun-violence-prevention organization, with nearly eleven million supporters across the country. Everytown was founded in 2014 as the combined effort of Mayors Against Illegal Guns, a national, bipartisan coalition of mayors combating illegal guns and gun trafficking, and Moms Demand Action for Gun Sense in America, an organization formed after a gunman murdered twenty children and six adults at an elementary school in Newtown, Connecticut. Everytown also includes a large network of gun-violence survivors who are empowered to share their stories and advocate for responsible gun laws, as well as a national movement of high school and college students working to end gun violence.

Over the past several years, Everytown has devoted substantial resources to researching and developing expertise in historical firearms legislation. Everytown has drawn on that expertise to file more than 100 amicus briefs in Second Amendment and other firearms cases, offering historical and doctrinal analysis that might otherwise be overlooked.

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amicus curiae, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Disarming unlawful users of controlled substances is constitutional under the Second Amendment analysis established in *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), and *United States v. Rahimi*, 602 U.S. 680 (2024). *See* U.S. Br. 12-42. Everytown submits this amicus brief to clarify two issues.

First, post-ratification evidence is a crucial part of the Second Amendment historical analysis, regardless of whether the founding or Reconstruction era is the central focus of that analysis. This Court has twice found it unnecessary to decide which period should be the focus. *See Rahimi*, 602 U.S. at 692 n.1; *Bruen*, 597 U.S. at 37-38. At the same time, it has consistently relied on post-ratification history in interpreting not just the Second Amendment, but a wide array of constitutional provisions. It should do the same here. Such evidence can, among other things, illuminate original public meaning, settle (or "liquidate") constitutional meaning, and contextualize legislative silence. Its role is particularly important in cases that involve new or evolving societal concerns. That is the case here: as the nation confronted increasing drug use in the late 19th- and early 20th-century, governments passed laws to address the problem, including laws directed at habitual drug users specifically. Accordingly, the Court should follow its longstanding approach in giving significant weight to later history in this case.

Second, because the historical record is consistent across time and demonstrates that Section 922(g)(3) is constitutional, this Court can again decline to

decide whether the founding era or the period around Reconstruction should take precedence in a case involving an irreconcilable conflict between the two periods. If it were to decide the issue, however, it should conclude that the Reconstruction era has primacy, consistent with originalist principles. At a minimum, the Court should clarify that both the founding and Reconstruction eras are important focal points of the Second Amendment historical analysis.

ARGUMENT

I. THE COURT SHOULD GIVE SIGNIFICANT WEIGHT TO POST-RATIFICATION HISTORY

Post-ratification history "is a critical tool of constitutional interpretation." *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008). Confining the examination of this nation's historical tradition of firearm regulation exclusively to the founding period would fly in the face of *Heller*, *Bruen*, *Rahimi*, decisions on other constitutional rights, originalist principles, and common sense.[2]

[2] The government correctly acknowledges that post-ratification history "can play an important role in cases of uncertainty about the Amendment's original meaning." U.S. Br. 27; *see also id.* at 4 (explaining that post-ratification history addresses any "doubts" that might "remain" after examining founding-era history). These statements, however, fall short of acknowledging the full role of post-ratification history under this Court's precedents and originalist doctrine.

A. Post-Ratification History Is A Key Part Of Second Amendment Historical Analysis

1. This Court routinely consults post-ratification history when resolving Second Amendment challenges

Heller established the groundwork for historical analysis in Second Amendment cases. After calling post-ratification history a "critical tool," Justice Scalia's opinion for the Court examined "how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century." 554 U.S. at 605. In doing so, it relied on "19th-century cases that interpreted the Second Amendment," "discussion of the Second Amendment in Congress and in public discourse after the Civil War," and "how post-Civil War commentators understood the right." *Bruen*, 597 U.S. at 21 (describing and quoting *Heller*, 554 U.S. at 610, 614, 616-19).

Bruen subsequently reaffirmed the importance of post-ratification history. It relied on mid-19th century cases and statutes, *see id.* at 51-55, and surveyed "public discourse surrounding Reconstruction" as demonstrating "how public carry for self-defense remained a central component of the protection that the Fourteenth Amendment secured for all citizens," *id.* at 60. And in discussing sensitive places, it indicated that "18th- *and 19th-century*" laws restricting the possession of guns in "legislative assemblies, polling places, and courthouses" satisfied its historical analysis. *Id.* at 30 (emphasis added). In the pages of the article and brief the Court cited for that proposition, all

the 19th-century laws restricting guns in the locations the Court listed were from the *late* 19th century.[3]

In *Rahimi*, the Court put the relevance of post-ratification history even further beyond doubt. It rested its decision upholding a challenged federal law in large part on laws passed between 1836 and 1868. *See* 602 U.S. at 696 (relying on Massachusetts surety statute from 1836); *id.* (invoking similar statutes of nine other jurisdictions by citation to *Bruen*, 597 U.S. at 56 & n.23, which cited 1838 Wisconsin, 1840 Maine, 1846 Michigan, 1847 Virginia, 1851 Minnesota, 1854 Oregon, 1857 District of Columbia, 1860 Pennsylvania, and 1868 West Virginia surety laws).

This Court has thus repeatedly made clear that post-ratification history plays a vital role when resolving Second Amendment challenges. Following the Court's lead, numerous lower courts have "comfortably rel[ied]" on later history to "discern th[e] meaning" of the Second Amendment." *Frey v. City of New York*, 157 F.4th 118, 129 (2d Cir. 2025) (emphasizing importance of such history "[e]ven if the 1791 understanding primarily controls"). As the Seventh Circuit recently put it, "the government is not constrained to only Founding Era laws." *United States v. Rush*, 130

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[3] *See* David B. Kopel & Joseph G.S. Greenlee, *The "Sensitive Places" Doctrine*, 13 Charleston L. Rev. 205, 244-47 (2018) (citing 1870 Louisiana law, 1874 and 1886 Maryland laws, 1873 Texas law, and 1874 decision upholding 1870 Georgia law); Br. for Indep. Inst. as Amicus Curiae 11-17, *Bruen* (No. 20-843) (July 20, 2021) (disputing relevance of 19th-century laws but (at 16 n.10) citing 1869 Tennessee, 1870 Texas, and 1890 Oklahoma laws that prohibited guns in (among others) polling places).

F.4th 633, 642 (7th Cir. 2025), *cert. denied*, 2025 WL 3620422 (U.S. Dec. 15, 2025).[4]

To be sure, *Bruen* cautioned that when "later history contradicts what the text says, the text controls." 597 U.S. at 36. It did so in the context of a challenge to a law that "prevent[ed] law-abiding citizens with ordinary self-defense needs from carrying arms in public for that purpose," *id.* at 60, and where the government expressly did not dispute that the Second Amendment's text protects carrying in public for self-defense, *see id.* at 32 (citing New York's brief). Then, surveying cases, regulations, treatises, and public discourse, the Court concluded that there was significant, affirmative evidence that the Second Amendment enshrined a right of people with ordinary self-defense needs to carry weapons in public for that purpose. *See, e.g.*, *id.* at 53-55 (concluding from state-court decisions that "history reveals a consensus that States could *not* ban public carry altogether"); *id.* at 56-57 (reading surety statutes as "presum[ing] that individuals had a right to public carry" and showing

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[4] *See also, e.g.*, *Nat'l Rifle Ass'n v. Bondi*, 133 F.4th 1108, 1121 (11th Cir. 2025) (en banc) (relying on "[m]id-to-late nineteenth-century laws consistent with [earlier] principles" in upholding age restriction), *petition for cert. filed sub nom. Nat'l Rifle Ass'n v. Glass*, No. 24-1185 (U.S. May 16, 2025); *McCoy v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 F.4th 568, 578-79 (4th Cir. 2025) (considering "later nineteenth-century history" in upholding age restriction), *petition for cert. filed*, No. 25-24 (U.S. July 3, 2025); *Bianchi v. Brown*, 111 F.4th 438, 465-71 (4th Cir. 2024) (en banc) (relying on 19th- and 20th-century evidence), *cert. denied*, 145 S. Ct. 1534 (2025); *Hanson v. District of Columbia*, 120 F.4th 223, 237-40, 238 n.7 (D.C. Cir. 2024) (same), *cert. denied*, 145 S. Ct. 2778 (2025); *Ocean State Tactical, LLC v. Rhode Island*, 95 F.4th 38, 46-48, 51-52 (1st Cir. 2024) (same), *cert. denied*, 145 S. Ct. 2771 (2025).

that "'everyone started out with robust carrying rights'" (emphasis and citation omitted)).

In light of that affirmative evidence, the Court dismissed a small number of laws from the late 19th and early 20th century that supported New York's law as inadequate to alter its conclusion. Those laws, it said, "contradict[ed] the overwhelming weight of other evidence." *Id.* at 65-66 (quoting *Heller*, 554 U.S. at 632); *see also id.* at 66 & n.28.[5] But short of that untenable use, this Court's precedents are clear. Post-ratification history—including from the Reconstruction era and beyond—is critical to understanding the Second Amendment right.

2. Relying on post-ratification history in Second Amendment cases accords with the Court's approach in other contexts

The Court's consideration of post-ratification history in *Heller*, *Bruen*, and *Rahimi* is consistent with its practice in other contexts. Just last term, the Court instructed that post-ratification practice can "embody a constitutional judgment—made by generations of legislators and by the American people as a whole—that commands our respect." *Free Speech Coal., Inc. v.*

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[5] The Court has done the same in First and Fifth Amendment cases: after finding substantial evidence of constitutional meaning in one period, it has concluded that later laws did not change that meaning. *See Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 480-82 (2020) (declining to credit 19th-century history against state support for religious schools where it conflicted with earlier history of governmental support to private schools); *Gamble v. United States*, 587 U.S. 678, 682, 702 (2019) (discounting later evidence about Fifth Amendment right when "text, other historical evidence, and 170 years of precedent" were "pointing the other way").

Paxton, 606 U.S. 461, 494 (2025). The Court has long recognized that such evidence "may have 'great weight in a proper interpretation of constitutional provisions.'" *Chiafalo v. Washington*, 591 U.S. 578, 592-93 (2020) (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)); *see id.* at 595 (examining "[c]ourts and commentators throughout the 19th century).

Accordingly, when consulting history and tradition to elucidate the scope of a constitutional guarantee, this Court has routinely examined "our whole experience as a Nation." *Id.* at 593 (citation omitted); *see also Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., Ltd.*, 601 U.S. 416, 442-45 (2024) (Kagan, J., concurring) (consulting tradition of practice across "more than two centuries"). To that end, in assessing individual-rights claims, the Court has considered a wide array of post-ratification evidence, including "legal treatises throughout the 19th century," *Ramos v. Louisiana*, 590 U.S. 83, 91-92 (2020) (Sixth Amendment), state court decisions from the mid-to-late 19th century, *see Torres v. Madrid*, 592 U.S. 306, 314 (2021) (Fourth Amendment), and "longstanding practice" from the 19th century and later, *see Houston Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 474-77 (2022) (First Amendment); *see also Town of Greece v. Galloway*, 572 U.S. 565, 575-79 (2014) (tracing continuous tradition from 19th century to present day in interpreting First Amendment).

Moreover, this Court has considered an array of post-ratification evidence even in cases where it has "assumed"—without deciding—that the scope of the right is "pegged to the public understanding" in 1791. *Bruen*, 597 U.S. at 37 (citing *Crawford v. Washington*, 541 U.S. 36, 42-50 (2004), *Virginia v. Moore*, 553 U.S.

164, 168-69 (2008), and *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 122-25 (2011)). In *Crawford*, for example, the Court examined sources from the 16th through the 19th centuries to determine the meaning of the Confrontation Clause. *See* 541 U.S. at 43-50.[6] And then, in answering another Confrontation Clause question in *Samia v. United States*, 599 U.S. 635 (2023), the Court discussed only 19th-century and later evidence. *See id.* at 644-46 (discussing treatises from 1816 and 1904 and cases from 1878, 1895, and 1896).

Justice Scalia, in particular, "made extensive use of post-ratification history," including history that "extended 'far beyond the time of enactment,'" and "had a very broad view of what traditions might be indicative of original meaning." *Rahimi*, 602 U.S. at 726 n.5 (Kavanaugh, J., concurring) (citation omitted) (collecting cases); *see also Harmelin v. Michigan*, 501 U.S. 957, 982-85 (1991) (plurality opinion) (Scalia, J.) (finding 19th-century judicial constructions to be "[p]erhaps the most persuasive evidence of what 'cruel and unusual' meant"). As he explained, "[w]here the meaning of a constitutional text … is unclear, the widespread and long-accepted practices of the American people are the best indication of what fundamental beliefs it was intended to enshrine." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 378 (1995) (Scalia, J., dissenting).

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[6] *See also Nev. Comm'n on Ethics*, 564 U.S. at 122-25 (finding consistent tradition from founding era through 20th century); *Moore*, 553 U.S. at 169-70 & n.4 (discussing 19th-century history).

In short, by giving significant weight to post-ratification history, the Court's Second Amendment decisions have adhered to its longstanding approach to historical inquiry. The Court's precedents make clear that post-ratification history is highly relevant to the Second Amendment analysis.

3. Considering post-ratification history is consistent with originalism

Post-ratification history can elucidate the meaning of constitutional text, including the Second Amendment, in a variety of ways that align with an originalist approach to constitutional interpretation. Such history can evidence the original understanding of the right, settle the meaning of ambiguous text through liquidation, and contextualize legislative inaction. In all of these ways, 19th-century and later evidence advances the *Bruen*-*Rahimi* originalist inquiry by providing a more complete picture of the "principles that underpin our regulatory tradition." *Rahimi*, 602 U.S. at 692.

a. As this Court recognized in *Heller*, post-ratification history offers valuable insight into the original public understanding at the time of the founding. *See* 554 U.S. at 605. *Heller* treated evidence from the late 18th century up through the Civil War equally. *See id.* at 605-14. It then observed that even post-Civil War evidence provided "insight into … original meaning," albeit "not … as much … as earlier sources," given the passage of 75 years since the Second Amendment's ratification. *Id.* at 614. Nevertheless, the Court explained, these post-war discussions involved those who were "born and educated in the early 19th century [and] faced a widespread effort to limit arms ownership by a large number of citizens; their

understanding of the origins and continuing significance of the Amendment is instructive." *Id*. In other words, these later generations were steeped in founding-era understandings, so their perspectives can supply important evidence of original meaning.

Heller's insights here accord with common sense. After all, "'[p]rinciples of liberty fundamental enough to have been embodied within constitutional guarantees are not readily erased from the Nation's consciousness.'" *Nev. Comm'n on Ethics*, 564 U.S. at 122 (citation omitted); *cf. Rahimi*, 602 U.S. at 724 (Kavanaugh, J., concurring) (citing the "'presumption that' unconstitutional 'acts would not have been allowed to be so often repeated as to crystallize into a regular practice'" (quoting *United States v. Midwest Oil Co.*, 236 U.S. 459, 472-73, (1915)). So, if a regulation passed in the decades around Reconstruction—within the lifetimes of some who were alive at the founding—did not raise a constitutional challenge at the time of its passage, and there is no separate historical evidence showing that the regulation would have raised constitutional concern in the decades prior, then it can be inferred that the regulation comports with the founding-era public understanding of the Second Amendment right.

b. Post-ratification history can also resolve the meaning of uncertain constitutional text. As *Bruen* explained, "a regular course of practice can liquidate [and] settle the meaning of disputed or indeterminate terms [and] phrases in the Constitution." 597 U.S. at 35-36 (cleaned up, quoting decision quoting James Madison). Indeed, the "Framers themselves intended that postratification history would shed light on the meaning of vague constitutional text." *Rahimi*, 602

U.S. at 725 (Kavanaugh, J., concurring). James Madison "articulated the Framers' expectation and intent that post-ratification history would be a proper and important tool" of constitutional interpretation. *Id.*; *see also, e.g.*, *Chiafalo*, 591 U.S. at 593 (citing writings of James Madison); *Vidal v. Elster*, 602 U.S. 286, 323 (2024) (Barrett, J., concurring in part) (same). And this Court has "followed Madison's lead" in numerous decisions from the early 1800s to the present day, considering post-ratification history to find liquidated constitutional meaning in all manner of cases. *See Rahimi*, 602 U.S. at 725, 728-29 (Kavanaugh, J., concurring) (collecting cases).

Because liquidation occurs through historical practice over time, later historical practice (including from the late 19th century) necessarily plays a significant role in the process. As Professor William Baude has explained, "[p]rivileging early practice through liquidation is tempting but wrong" because "[i]ndeterminate provisions remain open to liquidation for as long as their meanings remain contested." William Baude, *Constitutional Liquidation*, 71 Stan. L. Rev. 1, 59-60 (2019); *accord Bruen*, 597 U.S. at 35-36 (citing this article in its discussion of liquidation).

c. Post-ratification history can also illuminate constitutional meaning in the face of earlier legislative inaction. Legislatures do not always "maximally exercise[] their power to regulate." *Rahimi*, 602 U.S. at 739-40 (Barrett, J., concurring); *see also id.* at 705-06 (Sotomayor, J., concurring) (rejecting dissent's approach, under which "the legislatures of today would be limited not by a distant generation's determination that such a law was unconstitutional, but by a distant generation's failure to consider that such a law might

be necessary"). Accordingly, it cannot simply be assumed that an earlier legislature's inaction was driven by concerns about constitutionality rather than any number of other practical or policy considerations. *See, e.g.*, *Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969) ("Congressional inaction frequently betokens unawareness, preoccupation, or paralysis."). The Court recognized this point in *Dobbs v. Jackson Women's Health Organization*, decided the day after *Bruen*, where it observed that "the fact that many States in the late 18th and early 19th century did not criminalize" certain conduct "does not mean that anyone thought the States lacked the authority to do so." 597 U.S. 215, 217 (2022).

Where constitutional text does not provide a clear answer and there is legislative silence at the founding—rendering the historical record "elusive or inconclusive"—post-ratification history "becomes especially important" for ascertaining constitutional meaning. *Rahimi*, 602 U.S. at 723 (Kavanaugh, J., concurring). Whether it is understood as providing evidence of original public meaning or as liquidating indeterminate terms or phrases, 19th-century evidence will provide the answer most consistent with originalism in such cases. To reject that evidence when there is no independent reason to think that the generation whose understanding it reflects had drastically broken with the founding-era understanding—twenty or fifty or ninety years earlier—would be to supplant historical inquiry with modern choices.

B. Post-Ratification History Is Especially Important When Laws Implicate New Or Evolving Social Conditions

Post-ratification history, then, plays an important role in the Second Amendment historical analysis. And that later history is especially significant when laws address issues that were not present in earlier periods. When changing conditions lead to regulations that earlier generations would have had no reason to require (or even think of), history from the period when the new condition emerges is crucial to a coherent historical analysis. In those cases, later tradition completes the picture of a principles-based approach to history. It demonstrates how Americans applied traditional principles to shifting and novel circumstances consistent with the original understanding of the Constitution.

"'States adopt laws to address the problems that confront them,'" *McCullen v. Coakley*, 573 U.S. 464, 481 (2014) (citation omitted), and so understanding our regulatory tradition requires appreciating the changing nature of those problems. This Court has recognized as much, emphasizing that "[t]he regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868." *Bruen*, 597 U.S. at 27. Yet the Second Amendment "can, and must, apply to circumstances beyond those the Founders specifically anticipated." *Id.* at 28; *see Rahimi*, 602 U.S. at 691 (emphasizing that the Court's Second Amendment precedents "were not meant to suggest a law trapped in amber"). In order to ensure that the Second Amendment "applies to new circumstances," *Bruen*, 597 U.S. at 28, courts must calibrate

their historical inquiry carefully to the context surrounding those circumstances. Cases "implicating unprecedented societal concerns or dramatic technological changes," for example, "may require a more nuanced approach." *Id.* at 27. And appreciating later history is crucial to understanding how legislatures have responded to new and evolving social problems over time.

This Court has often reasoned in just this way. In considering the application of the First Amendment to large outdoor signs, it emphasized that "[o]ff-premises billboards of the sort that predominate today were not present in the founding era," and placed special weight on the fact that as soon as such advertisements "proliferated in the 1800s, regulation followed." *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 75 (2022). And when Justice Scalia consulted history to evaluate a prohibition on speech surrounding polling places, he focused his inquiry on the period when the nation first protected voters' interest in the privacy of their vote, beginning with "the widespread adoption of the secret ballot in the late 19th century." *Burson v. Freeman*, 504 U.S. 191, 214-15, 215 n.1 (1992) (Scalia, J., concurring in the judgment) (relying on historical laws from 1875 to 1896); *see also Vidal*, 602 U.S. at 312-16 (Barrett, J., concurring in part) (giving special consideration to history "[o]nce trademark law got off the ground in the mid-19th century" and "at the earliest point at which the First Amendment could have applied to trademark law").

Here, late 19th- and early 20th-century history is especially relevant because that is when the nation first recognized the harms of widespread drug abuse. While many drugs existed in some form at the

founding, "[s]oon after the Civil War, several factors combined to force the drug habit out from the shadows and to recast it as a pressing social problem." Timothy A. Hickman, *"Mania Americana": Narcotic Addiction and Modernity in the United States, 1870-1920*, 90 J. Am. Hist. 1269, 1270 (2004). During the war, military doctors had issued millions of doses of opium products, and many soldiers continued to use opium after the war to ease their pain. *See* David T. Courtwright, *Dark Paradise: A History of Opiate Addiction in America* 54-55 (expanded ed. 2001). At the same time, scientists developed more potent versions of and means of consuming drugs, creating modern cocaine and injectable morphine. *See* Jeffrey Clayton Foster, *The Rocky Road to a "Drug Free Tennessee": A History of the Early Regulation of Cocaine and the Opiates, 1897-1913*, 29 J. Soc. Hist. 547, 548 (1996). These drugs "became something of a panacea" and were used to treat a wide array of ailments. David T. Courtwright, *The Hidden Epidemic: Opiate Addiction and Cocaine Use in the South, 1860-1920*, 49 J. S. Hist. 57, 67 (1983). Widespread use, however, led to widespread addiction, and "[b]y the late 1880s and early 1890s, … the reputation of both substances had dramatically declined." Foster, 29 J. Soc. Hist. at 548.

This crisis led to some of the first efforts to regulate drugs to protect public safety and punish drug users. Sanctions that had previously been imposed on alcoholics, *see* U.S. Br. 18-22 & 21 n.12, were extended to those who abused drugs, allowing for the involuntary commitment of drug users who had, for example, "lost the power of self-control" or were "dangerous to themselves or others." *See, e.g.*, Act of July 25, 1874, ch. 113, § 1, 1874 Conn. Pub. Acts 256 (providing for commitment to "inebriate asylum" for those "so far

addicted to the intemperate use of narcotics or stimulants as to have lost the power of self-control"); Act of June 21, 1875, ch. 627, § 7, 1875 N.Y. Laws 788 (defining "habitual drunkard" for purposes of acts governing Kings County inebriates' home to include those who "by reason of habits of periodical, frequent or constant drunkenness, induced … by … opium or other narcotic or intoxicating or stupefying substances" are found "to be incapable or unfit to properly conduct their own affairs, or dangerous to themselves or others, or to neglect or fail to support themselves [or their dependents]");[7] Act of Mar. 27, 1876, ch. 208, § 7, 1875-1876 Va. Acts 248-49 (setting out process for commitment to hospital of an "opium eater" who is "lost to self-control");[8] Act of Apr. 13, 1895, ch. 74, §§ 1, 2, 1895 Colo. Acts 172-73 (providing for petition for a "habitual drunkard" to be institutionalized if the "disease of such drunkard in reference to the use of alcoholic, narcotic or other stimulants" has "passed beyond the control of said drunkard"); Act of May 13, 1897, no. 130, §§ 1, 3, 4, 1897 Mich. Acts 151-52 (permitting appointment of guardian for a person "so

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[7] An earlier law governing the inebriates' home permitted six-month commitment of people convicted as habitual drunkards. *See* Act of June 18, 1873, ch. 797, § 6, 1873 N.Y. Laws 1203. A later law applied throughout New York City. *See* Act of Apr. 7, 1902, ch. 397, § 5, 1902 N.Y. Laws 1014 (setting out process for a person who has been "declared incompetent to manage himself or his affairs, in consequence of habitual drunkenness induced either by the use of alcoholic, narcotic or other substances" to be committed to inebriates' home).

[8] In 1903, the Virginia legislature expanded this provision beyond opium users to include those "addicted to other drug habits and lost to self-control." Act of Mar. 25, 1903, ch. 101, § 1, 1902-1904 Va. Acts 92.

addicted to the excessive use of … narcotic or noxious drugs, as to require medical or sanitary treatment or care," and permitting guardian to seek an order for the ward "to be taken to and restrained in any suitable asylum or hospital").[9]

Even though these laws connect a central pillar of the government's historical case—restrictions on

[9] At least eight other states adopted similar laws between 1900 and 1920. *See* Act of Apr. 12, 1902, ch. 93, § 2, 1902 Iowa Acts 58-59 (providing for "persons addicted to the excessive use of morphine or other narcotics" to be committed by a judge to a "hospital for inebriates"); Act of Apr. 16, 1903, no. 153, 1903 Pa. Sess. Laws 211 (setting out process for "any person so habitually addicted to the use of … opium, morphine, chloral, or other intoxicating … drug" to be committed to a "hospital or asylum, for restraint, care and treatment"); Mississippi Code of 1906, § 2433, pp. 738-39 (Whitfield et al. eds. 1906) (permitting court to "direct the confinement of any person adjudged to be an … habitual user of cocaine, or opium or morphine, in an asylum"); Act of Apr. 22, 1907, ch. 288, §§ 2, 4, 9, 1907 Minn. Gen. Laws 387-89 (setting out process for committing an "inebriate" to a "hospital farm for inebriates," and defining "inebriate" to include "every species of chronic inebriety, whether caused by the excessive use of intoxicating liquors, morphine, opium, cocaine, chloral, or other narcotics"); Act of Jan. 13, 1911, no. 121, § 1, 1910-1911 Vt. Acts & Resolves 125 (permitting probate court to order committed to an institution a person "so addicted to the intemperate use of narcotics or stimulants as to have lost the power of self-control"); Act of July 1, 1911, ch. 214, § 1, 1911 Cal. Stat. 396 (permitting judge to confine to a "hospital for the care and treatment of the insane" an individual who "is so far addicted to the intemperate use of narcotics or stimulants as to have lost the power of self-control"); Act of Mar. 4, 1913, ch. 56, § 1, 1913 Idaho Laws 166-67 (permitting judge to commit to "insane asylum[]" a person who "is so far addicted to the intemperate use of narcotics or stimulants as to have lost the power of self control"); Act of Apr. 12, 1918, ch. 139, § 1, 1918 Mass. Gen. Acts 112-13 (permitting judges to commit to hospital a person "who is so addicted to the intemperate use of narcotics or stimulants as to have lost the power of self control").

"drunkards"—to the emerging drug problem, the government's brief does not mention them. It discusses late 19th- and early 20th-century restrictions on drugs, *see* U.S. Br. 28, but not restrictions on habitual drug users. It then jumps ahead to the period in the 1920s and 1930s when legislatures began to disarm drug users more directly. As the government correctly explains, state legislatures in the early 20th century began to address head on "the risks posed by the combination of drugs and guns," passing laws "to prohibit drug addicts or drug users from possessing, carrying, or purchasing handguns," and "Congress followed suit." *Id.* at 28-29. But the laws the government did not include are an important part of the regulatory tradition undergirding Section 922(g)(3), showing how restrictions on habitual drunkards expanded to include users of drugs.

In short, restricting firearm use by illegal drug users is "as old as legislative recognition of the drug problem itself." *Id.* at 31. As soon as modern concerns about drugs began to "proliferate[,] … regulation followed." *See City of Austin*, 596 U.S. at 75.

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Post-ratification history deserves significant weight in this case, consistent with this Court's methodology in *Heller*, *Bruen*, *Rahimi*, and a wide range of other cases. Considering the complete historical record demonstrates that Section 922(g)(3) is consistent with historical tradition. That tradition has evolved in its particulars in response to changing social conditions, but has remained unchanged at the level of principle: legislatures can disarm those who pose a heightened risk of firearm misuse, including for the reasons that Section 922(g)(3) implicates—frequent

use of intoxicants and disregard for society's legal norms.

II. SECOND AMENDMENT HISTORICAL ANALYSIS SHOULD FOCUS ON THE RECONSTRUCTION ERA

This Court has twice left open which time period to privilege in the Second Amendment analysis because it has found the public understanding of the right to have remained consistent throughout our nation's history. *See Rahimi*, 602 U.S. at 692 n.1; *Bruen*, 597 U.S. at 37-38. Here, too, the Court need not resolve the issue because the evidence from both the founding and Reconstruction is consistent. *See* U.S. Br. 17-32. And as explained above, the Court need not decide the question in order to rely on Reconstruction-era and later history, since post-ratification history is relevant even if the analysis centers on 1791. *See supra* Section I. If the Court reaches the issue, however, it should conclude that the Second Amendment historical inquiry properly centers on 1868, when the Fourteenth Amendment was ratified. At a minimum, it should clarify that the Reconstruction era is an especially instructive period to consider alongside the founding.

A. Originalist Principles Make The Reconstruction Era Public Understanding Determinative

1. Originalism requires focusing on 1868 for state laws

An originalist analysis of the Second Amendment in a case challenging a state law should focus on the understanding of the right in 1868. That conclusion follows directly from the principle that "[c]onstitutional rights are enshrined with the scope they were

understood to have *when the people adopted them*." *Bruen*, 597 U.S. at 34 (quoting *Heller*, 554 U.S. at 634-35). As this Court emphasized in *Bruen*, a state "is bound to respect the right to keep and bear arms because of the Fourteenth Amendment, not the Second." *Id.* at 37. So, focusing on 1868 for challenges to state laws is the only way to answer the originalist question: How did the people understand the right at the time they adopted it?

The Supreme Court's decision in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), reinforces this conclusion. *McDonald* analyzed at length the public understanding around 1868 before holding that the Second Amendment constrains the states. *See* 561 U.S. at 770-78. That approach is hard to square with a belief that only the 1791 understanding informs the content of the right: "It would be incongruous to deem the right to keep and bear arms fully applicable to the States by Reconstruction standards but then define its scope and limitations exclusively by 1791 standards." *Antonyuk v. James*, 120 F.4th 941, 973 (2d Cir. 2024), *cert. denied*, 145 S. Ct. 1900 (2025).

Enforcing against the states an understanding of a constitutional right different from the one that prevailed in 1868 would be untenable under originalism. That fact explains Justice Thomas's statement that he "would begin the assessment of the scope of free-speech rights incorporated against the States by looking to what ordinary citizens at the time of the Fourteenth Amendment's ratification would have understood the right to encompass." *Mahanoy Area Sch. Dist. v. B. L.*, 594 U.S. 180, 212 (2021) (Thomas, J., dissenting) (citation omitted). Justice Scalia, in evaluating a state law under the First Amendment,

similarly called for "further evidence of common practice in 1868, since I doubt that the Fourteenth Amendment time-warped the post-Civil War States back to the Revolution." *McIntyre*, 514 U.S. at 375 (Scalia, J., dissenting).

The conclusion that the 1868 understanding should govern in a case against a state has also been embraced by prominent practitioners and originalist scholars. It is the answer former Solicitor General Paul Clement gave when asked about which period to prioritize during oral argument as counsel for the petitioners in *Bruen*.[10] Professor Steven Calabresi and Sarah Agudo have argued for looking not to "the original meaning of the first ten Amendments in 1791 but instead" to "the meaning those texts and the Fourteenth Amendment had in 1868."[11] Professor Josh Blackman and Ilya Shapiro have written that "1868 is … the proper temporal location for applying a whole host of rights to the states, including the right that had earlier been codified as the Second Amendment" and that "[i]nterpreting the right to keep and bear arms as instantiated by the Fourteenth Amendment—based on the original public meaning in 1791—thus yields an inaccurate analysis."[12] And Professor

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[10] *See* Tr. of Oral Arg. at 8:2-17, *Bruen* (No. 20-843) ("[I]f … the case arose in the states, I would think there would be a decent argument for looking at the history at the time of Reconstruction … and giving preference to that over the founding.").

[11] Steven Calabresi & Sarah Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition*?, 87 Tex. L. Rev. 7, 115-16 & 116 n.485 (2008).

[12] Josh Blackman & Ilya Shapiro, *Keeping Pandora's Box Sealed: Privileges or Immunities, the Constitution in 2020, and*

Stephen Siegel has written that he is both "unaware of any discussion by an originalist asserting, as a matter of theory, that the meaning of the Bill of Rights in 1789 should be preferred to its meaning in 1868 when the subject is the limitations the Fourteenth Amendment imposes on the states," and "unable to conceive of a persuasive originalist argument asserting the view that, with regard to the states, the meaning of the Bill in 1789 is to be preferred to its meaning in 1868."[13]

A faithful originalist analysis compels this conclusion. The people adopted the Second Amendment right against the states in 1868, so their understanding of the right at that time must be determinative.

2. Focusing on 1868 for federal laws follows from the Court's commitment to equivalent state and federal standards

The choice between 1791 and 1868 is more complex in a case, like this one, challenging a federal law. Because the Second Amendment has bound the federal government since 1791, the intuitive answer would seem to be to focus on the founding-era understanding. *See, e.g.*, Blackman & Shapiro, 8 Geo. J.L. & Pub. Pol'y at 52 (arguing that 1791 was the correct

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Properly Extending the Right to Keep and Bear Arms to the States, 8 Geo. J.L. & Pub. Pol'y 1, 52 (2010).

[13] Stephen Siegel, *Injunctions for Defamation, Juries, and the Clarifying Lens of 1868*, 56 Buff. L. Rev. 655, 662 n.32 (2008); *see also*, *e.g.*, Evan D. Bernick, *Fourteenth Amendment Confrontation*, 51 Hofstra L. Rev. 1, 23 (2022) (calling 1868 view "ascendant among originalists"); Michael B. Rappaport, *Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings, But the Fourteenth Amendment May*, 45 San Diego L. Rev. 729, 748 (2008).

focus in *Heller*). However, the Court said in *Bruen* that individual rights "have the same scope" against the federal government as against the states. 597 U.S. at 37. If the Court maintains that approach, then it requires a principle, consistent with originalism, to justify applying either a 1791 understanding to the states or an 1868 understanding to the federal government.

Bruen charted the path through this complexity, pointing towards focusing on 1868 for both state and federal laws. After identifying the time-period issue, *Bruen* cited the scholars Akhil Amar and Kurt Lash, who have explained that the 1868 understanding should apply to both the federal and state governments. *See id.* at 37-38 (citing Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* xiv, 223, 243 (1998); Kurt T. Lash, *Re-Speaking the Bill of Rights: A New Doctrine of Incorporation*, 97 Ind. L.J. 1439, 1441 (2022)). As quoted in *Bruen*, Professor Lash has written that the adoption of the Fourteenth Amendment "invested those original 1791 texts [of the Bill of Rights] with new 1868 meanings." *Id.* at 38 (citation omitted). Similarly, Professor Amar has explained how in adopting the Fourteenth Amendment, the people ratified their understandings of the rights they were incorporating against the states, creating a "doctrinal 'feedback effect' against the federal government." Amar, *The Bill of Rights* 243, 283.

The Court chose to highlight only these two authors, and it identified no scholarship or other authority explaining how an originalist could accept the contrary position—inflicting upon the states an understanding of the Second Amendment right different from the one the Reconstruction generation believed

it was extending to them.[14] Regardless of whether one adopts the specific accounts of Professors Lash or Amar, *Bruen* points toward 1868 as the moment when the people readopted the Second Amendment right through the amendment process, ratifying their understanding of the right as our fundamental law. That means that 1868 should be the originalist focus for challenges to both federal and state laws.[15]

B. At A Minimum, 1868 And 1791 Are Both Important Focal Points

At the very least, this Court should clarify that the period around Reconstruction is an important focal point of the Second Amendment historical analysis alongside the founding era, given the strong originalist case for looking to Reconstruction. Both periods were times when the nation devoted public attention and discussion to the right to keep and bear arms in

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[14] As the Court noted in *Bruen*, it had "generally assumed" that the scope of enumerated rights was "pegged to the public understanding … in 1791" in a number of cases. 597 U.S. at 37. Accordingly, it has at times treated founding-era evidence as having precedence over Reconstruction-era evidence, when the two conflict. *See Espinoza*, 591 U.S. at 480-82; *Gamble*, 587 U.S. at 682, 702. But that *assumption* in prior cases could not have resolved the question that *Bruen* and *Rahimi* then explicitly left open. *See Rahimi*, 602 U.S. at 692 n.1; *Bruen*, 597 U.S. at 37-38. And those decisions did not grapple with the problem, for originalism, of subjecting the states to a different understanding of constitutional rights than the people understood themselves to be adopting.

[15] Thus, at least while this Court maintains that the standard for the federal and state governments must be the same, we disagree with the government's claim that "[f]ounding-era evidence … supplies the most important evidence of the Second Amendment's meaning." U.S. Br. 18.

the course of adopting it as part of our constitutional law. Absent some irreconcilable conflict between positive evidence from the two periods, there is no reason why courts should not look to both as highly instructive.

The Reconstruction era saw "an outpouring of discussion of the Second Amendment in Congress and in public discourse." *Heller*, 554 U.S. at 614; *see also McDonald*, 561 U.S. at 770-78. The nation was giving renewed attention to the nature and scope of the right at the time the people were once again ratifying it as a constitutional guarantee. For that reason, evidence from around Reconstruction is highly probative of the scope of the right.

The Court already pointed in *Bruen* toward an approach that focuses on both the founding and Reconstruction. It noted that "[t]he Second Amendment was adopted in 1791; the Fourteenth in 1868," before suggesting the importance of evidence from around "either date." 597 U.S. at 34; *see also McIntyre*, 514 U.S. at 372 (Scalia, J., dissenting) (focusing historical inquiry on "the very time the Bill of Rights or the Fourteenth Amendment was adopted"). Courts of appeals, as well, have adopted this as a workable approach. *See, e.g.*, *United States v. Duarte*, 137 F.4th 743, 755 (9th Cir. 2025) (en banc) ("[W]e primarily look to historical regulations extant when the Second and Fourteenth Amendments were adopted in 1791 and 1868, respectively."), *petition for cert. filed*, No. 25-425 (U.S. Oct. 6, 2025); *Antonyuk*, 120 F.4th at 974 ("1791 and 1868 are both fertile ground[.]").

Even if the Court does not hold that 1868 is the primary focus of the Second Amendment historical analysis, it should recognize the strength of the

originalist argument for the importance of 1868. That argument provides a compelling reason to emphasize that both Reconstruction and the founding are important focal points. In the ordinary case, absent unavoidable conflict of positive evidence between the two periods, it makes no sense as a matter of originalist or historical method to disregard or discount evidence from the period around 1868.

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Consideration of the full historical record, including post-ratification evidence, establishes that Section 922(g)(3) sits at the intersection of multiple regulatory traditions. The law is consistent with the traditions of disarming the habitually intoxicated, *see* U.S. Br. 18-29 (tracing evidence from before the founding to 20th century); disarming those who present a particular risk of harm when armed, *see id.* at 14-16 (same); and disarming those "who have demonstrated disrespect for legal norms of society," *United States v. Jackson*, 110 F.4th 1120, 1127 (8th Cir. 2024), *cert. denied*, 145 S. Ct. 2708 (2025); *see* Pet. 16 (noting that the illegality of drugs means that "[h]abitual drug users … pose a greater danger of misusing firearms than do 'ordinary, law-abiding citizens'" (quoting *Bruen*, 597 U.S. at 9)). Considering these historical principles "taken together," *Rahimi*, 602 U.S. at 698, the constitutionality of Section 922(g)(3) is beyond doubt.

CONCLUSION

This Court should reverse the judgment of the court of appeals.

Respectfully submitted.

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DECEMBER 2025